IN THE

Supreme Court of the United States

NOV 21 1951

OCTOBER TERM, 1951.

No. 438

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of WEST COAST CABINET WORKS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, California State Board of Equalization (the agency of the State of California charged with the administration and enforcement of the California Sales and Use Tax Law) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 21, 1951.

Opinions Below.

The referee in bankrutcy rendered no opinion but merely made an Order enjoining petitioner from enforcing the provisions of the California Sales and Use Tax Law against respondent. [R. 17-19.] The opinion of the District Court is reported in 92 Fed. Supp. 636. The majority and concurring opinions of the Court of Appeals [R. 123-132] are reported in 191 F. 2d 726, 730.

Jurisdiction.

The judgment of the Court of Appeals was entered August 21, 1951. [R. 133.] A timely petition for rehearing was denied on October 26, 1951. [R. 134.] The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) and 11 U. S. C. Section 47(c), Bankruptcy Act Section 24(c).

Questions Presented.

1. Whether, despite the most recent expression of this Court's views in the majority and concurring opinions in *Alabama Public Service Commission, et al. v. Southern Ry. Co.,* 341 U. S. ....., 71 S. Ct. 762, 95 L. Ed. Adv. Ops. 721, relating to the jurisdiction of the Federal District Courts, the Court of Appeals correctly held that a referee in bankruptcy is possessed of jurisdiction to enjoin a state taxing agency from enforcing a valid state taxing statute against a trustee in bankruptcy engaged in liquidating a bankrupt's estate.

2. Whether, despite the views expressed by this Court in *Graves et al. v. People of State of New York ex rel. O'Keefe,* 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, the Court of Appeals correctly held that the application of a non-discriminatory state taxing statute to a trustee in bankruptcy engaged in liquidating a bankrupt's estate amounts, *per se,* to an unconstitutional interference with and harassment of the trustee in the performance of his official duty and burdens and impedes the trustee's administration of a bankrupt's estate.

3. Whether the sales tax provisions of the California Sales and Use Tax Law, which impose an excise tax on retailers for the privilege of selling tangible personal

property at retail, may constitutionally be applied to a trustee in bankruptcy who is liquidating a bankrupt's estate, the taxing statute providing that retailers shall pass the burden of the tax on to their vendees. The Court of Appeals merely cited the decisions of this Court in *McCulloch v. Maryland*, 4 Wheat. 315, 4 L. Ed. 579, and *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, in support of its holding that the taxing statute could not constitutionally be so applied.

4. Whether the use tax provisions of the California Sales and Use Tax Law (which impose upon retailers the duty of collecting a use tax from their vendees in connection with sales of tangible personal property not subject to the sales tax provisions of the Law) may constitutionally be applied to a trustee in bankruptcy liquidating a bankrupt's estate.

The Court of Appeals completely ignored the use tax provisions of the California Sales and Use Tax Law despite the fact that the District Judge's Order [R. 48, 49] purported to permanently enjoin petitioner from enforcing against respondent *any* of the provisions of the California Sales and Use Tax Law, and despite the fact that the application of the use tax provisions was fully discussed in the briefs filed and in the course of extensive oral argument. Although the decision of the Court of Appeals for the Second Circuit in *City of New York v. Jersawit*, 85 F. 2d 25, which upheld the application of the New York city sales tax (a consumer's tax) to a trustee in bankruptcy liquidating an insolvent estate was cited to the court below, neither the majority nor concurring opinion attempts to reconcile or distinguish that decision.

Statutes Involved.

A pamphlet copy of the entire California Sales and Use Tax Law, as printed and distributed by the California State Board of Equalization, is incorporated herein as Appendix "A," *infra*, to fully disclose the nature and character of the California taxing statute. Although the attached pamphlet is a 1949 edition, the histories following each section fully disclose the provisions in effect during the period the specific sales by the petitioner herein were made.

Briefly stated, the California Sales and Use Tax Law provides for the imposition of a three per cent excise tax upon the privilege of selling tangible personal property at retail (see Section 6051 of the California Sales and Use Tax Law, *infra*, Appendix "A"), and a complementary three per cent excise tax upon the storage, use or other consumption in this State of tangible personal property purchased from any retailer in instances where the retailer is not subject to the tax imposed by Section 6051. In instances where the excise tax imposed upon the privilege of selling tangible personal property at retail is applicable, any retailer subject to the tax is authorized to pass the burden of the tax on to his vendees. (Section 6052 of the California Sales and Use Tax Law, *infra*, Appendix "A"). Where the use tax provisions are applicable, the tax is, of course, payable by the consumer, the retailer being charged merely with the duty of collecting the tax and reporting it to the State. (See Section 6203 of the California Sales and Use Tax Law, *infra*, Appendix "A".)

It should be noted in passing that the California Sales and Use Tax Law is the codification effected in 1943 of the Retail Sales Tax Act of 1933, as amended, and the Use Tax Act of 1935, as amended.

The following sections of 28 U. S. C. A. are also pertinent:

Section 1341:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Section 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Section 2284:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure

of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force

only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

Statement.

Proceedings involving West Coast Cabinet Works, Inc., a corporation (hereinafter referred to as "the bankrupt"), were first commenced in the Bankruptcy Court on February 5, 1946 by the filing of a petition under Chapter XI of the Bankruptcy Act. Prior to that date the bankrupt had been engaged in the business of selling tangible personal property at retail in the State of California under a seller's permit issued by petitioner pursuant to the provisions of the California Sales and Use Tax Law, California Revenue and Taxation Code, Division 2, Part 1, *infra*, Appendix "A". It is not disputed that the bankrupt, prior to the filing of the petition under Chapter XI, duly filed the returns and paid the tax required by the California Sales and Use Tax Law. [R. 86-87.]

Upon the filing of the bankrupt's petition under Chapter XI, respondent was appointed as receiver and shortly thereafter nominated to act as trustee in the event adjudication occurred. Respondent's prospective nomination as trustee was duly approved by the referee having jurisdiction of the bankruptcy proceeding. [R. 87.]

Upon his appointment as receiver in the Chapter XI proceedings respondent applied for and obtained from petitioner a seller's permit as provided for by Section 6066 of the California Sales and Use Tax Law, *infra*, Appendix "A", and engaged in the business of selling tangible personal property at retail in the State of California. Respondent has not disputed that he was subject to the provisions of the California Sales and Use Tax Law during the time he acted as receiver, namely, February 5, 1946 to and including March 11, 1946, and the tax returns and payments required for that period are not involved herein. [R. 87-88.]

On March 12, 1946 West Coast Cabinet Works, Inc., was adjudicated bankrupt and respondent was appointed trustee in bankruptcy. As was the case when respondent was appointed receiver, he forthwith applied for and obtained from petitioner a seller's permit as provided for by Section 6066 of the California Sales and Use Tax Law, and it was stipulated [R. 88] that respondent made sales of tangible personal property at retail in the State of California during the period March 12, 1946 to and including May 1, 1946, and filed the returns required by the California Sales and Use Tax Law for that period. The record also discloses [R. 63-66] that respondent made numerous retail sales and sales for resale of tangible personal property first as receiver and then as trustee in bankruptcy during the period commencing March 12, 1946 to and including May 14, 1946, beyond the period for which returns were filed.

In September of 1946, upon audit of the returns filed by respondent as aforesaid, petitioner made a deficiency determination (assessment) in the manner provided for by Chapter 5, Article 2, of the California Sales and Use Tax Law, *infra*, Appendix "A", attributable to the sale of five trucks on March 29, 1946, which had not been reported by respondent on said returns. [R. 6, 66, 89.] Respondent did not seek administrative review of this determination as provided for by Chapter 5, Article 5, of the California Sales and Use Tax Law, *infra*, Appendix "A", nor did he pay the tax and seek judicial review as provided for by Chapter 7 of the taxing statute. [R. 89.]

Ignoring completely the provision made by the California Sales and Use Tax Law for administrative and judicial review of deficiency determinations thereunder, respondent, on October 3, 1946, obtained an *ex parte*

order from the referee in bankruptcy which directed the various members of the California State Board of Equalization, petitioner herein, to appear before the referee and show cause why petitioner should not be permanently enjoined and restrained from enforcing any of the provisions of the California Sales and Use Tax Law against respondent. [R. 4.] The order directed that service be made by mail and subsequent amendment of the petition upon which the order was isued made clear that the enforcement sought to be enjoined related specifically to the deficiency determination made by petitioner as set forth above. [R. 5-7, 66, 89.]

Several hearings were had before the referee in bankruptcy upon the order to show cause directed to petitioner. Reference to the entire record herein will disclose that respondent made no showing that petitioner had taken or threatened action of any kind to enforce collection of the aforesaid deficiency determination, and the hearings before the referee cannot be deemed to have amounted to hearings on objections to a claim inasmuch as payment of this tax deficiency would constitute an expense of administration, and, as such, not properly the subject of proof of claim. On December 9, 1946, however, the referee nevertheless made his order permanently restraining and enjoining petitioner from in any manner whatsoever enforcing the aforesaid determination against respondent or from enforcing or attempting to enforce against respondent any of the provisions of the California Sales and Use Tax Law in connection with the sales upon which the determination was predicated. [R. 17-19.]

Thereafter, upon a petition for review of the referee's order, the District Judge affirmed the order holding (in the opinion reported in 92 Fed. Supp. 636) that the ref-

eree in bankruptcy had jurisdiction to enjoin petitioner from enforcing the provisions of the California Sales and Use Tax Law against respondent and that the provisions of the California Sales and Use Tax Law could not constitutionally be applied to trustees in bankruptcy in the liquidation of bankruptcy estates. [R. 48-49.]

The Court of Appeals affirmed the order of the District Court, dismissing, in passing, petitioner's contentions as to the referee's lack of jurisdiction; disregarding, as did the District Judge, petitioner's long-continued administrative practice in applying the California Sales and Use Tax Law in connection with liquidating sales [R. 25-27]; ignoring entirely the use tax provisions of the California statute, which, if applicable to respondent, would have merely required him to collect the tax from his vendees and report and pay it over to petitioner; and making no attempt to distinguish the numerous decisions of this Court and courts in other jurisdictions supporting petitioner's contentions.

A timely petition for rehearing was filed with the Court of Appeals in which it was pointed out:

> 1. That neither the majority nor concurring opinion is predicated upon the facts actually disclosed by the record;
>
> 2. That there is no basis for concluding, *per se*, as a matter of law, that conflict between Federal and State laws would be fostered by upholding the application of the California Sales and Use Tax Law to trustees in bankruptcy making liquidation sales;
>
> 3. That there is no basis in fact for the conclusion reached in the concurring opinion that upholding the

application of the California Sales and Use Tax Law to trustees in bankruptcy making liquidation sales would "burden or impede administration of acts relating to bankruptcies";

4. That the majority and concurring opinions both ignore entirely the use tax provisions of the California Sales and Use Tax Law and the decision of the Second Circuit in *City of New York v. Jersawit, supra* (85 F. 2d 25), a decision squarely in point;

5. That both the majority and concurring opinions in considering the jurisdictional issue involved give no recognition to the views expressed by this court in the majority and concurring opinions in *Alabama Public Service Commission,, et al. v. Southern Ry. Co., supra* (341 U. S. ....., 71 S. Ct. 762, 95 L. Ed. Adv. Ops. 721);

6. That the decisions relied upon by the Court of Appeals, namely, the decision of this Court in *Gardner v. New Jersey,* 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504, and the decision of the Second Circuit in *Lyford, et al. v. City of New York,* 137 F. 2d 782, have no bearing upon the jurisdictional issue involved in this matter inasmuch as those decisions were concerned with tax liabilities incurred by the bankrupt and existing prior to the commencement of bankruptcy proceedings and not with items which would be expenses of administration, as is the case here;

7. That the Court of Appeals had misconstrued the California taxing statute (a) by disregarding the long-continued administrative practice of petitioner [R. 24-29], (b) by ignoring the decisions of the California Supreme Court in *Coca-Cola Co. v. State Board of Equalization,* 25 Cal. 2d 918, 156 P. 2d. 1, and *Kamp v. Johnson,* 15 Cal. 2d. 187, 191, and (c) by citing the decision of the California District Court of Appeal in *Los Angeles City High School District v. State Board of Equalization,* 71 Cal. App. 2d 486, 163 P. 2d 485, for a point which was specically left open by that decision;

8. That the Court of Appeals had ignored the views expressed by this Court in *Graves v. People of State of New York ex rel. O'Keefe,* 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, as well as the views expressed by the Court of Appeals for the Eighth Circuit in *State of Missouri v. Gleick,* 135 F. 2d. 134;

9. That the Court of Appeals had ignored the views expressed by this Court in *Alabama Public Service Commission v. Southern Ry. Co., supra,* with reference to the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts even in matters dealing with regulation rather than, as is the case here, with the application of a non-discriminatory taxing statute enacted solely for revenue producing purposes.

The petition for rehearing was nevertheless denied without opinion.

Specification of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that a referee in bankruptcy has jurisdiction to enjoin and restrain the assessment, levy, and collection of the taxes imposed by the California Sales and Use Tax Law although that Law provides a plain, speedy and efficient remedy in the courts of the State of California.

2. In holding that the application of a non-discriminatory state taxing statute, the California Sales and Use Tax Law, to a trustee in bankruptcy engaged in liquidating a bankrupt estate would amount, *per se,* to an unconstitutional interference with and harassment of the trustee in the performance of his official duty and burden and impede the trustee's administration of a bankrupt's estate.

3. In holding that the sales tax provisions of the California Sales and Use Tax Law cannot constitutionally be applied to a trustee in bankruptcy liquidating a bankrupt's estate.

4. In ignoring the use tax provisions of the California Sales and Use Tax Law and failing to hold in any event that the use tax provisions of that Law may constitutionally be applied to a trustee in bankruptcy liquidating a bankrupt's estate.

5. In failing to predicate its holding upon the facts disclosed by the record below.

6. In failing to construe the California Sales and Use Tax Law in the light of the long-continued administrative construction of that Law by the State taxing agency duly charged with its administration and enforcement, and in the light of pertinent decisions of the California Supreme Court.

7. In affirming the order of the District Court.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is directly in conflict with the decision of this Court in *Alabama Public Service Commission, et al. v. Southern Ry. Co.*, 341 U. S. ....., 71 S. Ct. 762, 95 L. Ed. Adv. Ops. 721, insofar as the decision of the Court of Appeals holds that an injunction may issue against a State taxing agency to restrain that agency from enforcing a valid state taxing statute, (a) despite 28 U. S. C. A., Section 1341, (b) without application to a three-judge court as is provided for by 28 U. S. C. A., Sections 2281 and 2284, (c) without a showing of possible or probable irreparable injury, and (d) despite the fact that a plain, speedy and efficient remedy may be had in the courts of the State of California.

See Sections 6561-6566, 6901-6937 of the California Sales and Use Tax Law infra, Appendix "A". *Nevada-California Electric Corp. v. Corbett*, 22 Fed. Supp. 951, *Corbett v. Printers & Publishers Corp., Ltd.*, 127 F. 2d 195, *Helms Bakeries v. State Board of Equalization*, 53 Cal. App. 2d 417, 128 P. 2d 167, and *Estate of Schneider*, 62 Cal. App. 2d 463, 145 P. 2d 90, all relating to the nature and adequacy of the remedies provided by the California taxing statute.

2. The decision below, by ignoring the use tax provisions of the California Sales and Use Tax Law, and, therefore, in effect holding that a trustee in bankruptcy liquidating a bankrupt's estate is not subject to those provisions, is directly in conflict with the decision of the Court of Appeals for the Second Circuit in *City of New York v. Jersawit*, 85 F. 2d 25.

In the *Jersawit* case, in a decision written by Judge Augustus N. Hand and joined in by Judges Learned Hand and Chase, the Court of Appeals for the Second Circuit held that imposition of the New York city sales tax on the sale of a bankrupt's stock and fixtures at auction by a trustee in bankruptcy, the trustee being required to collect the tax from his vendees and report and pay it over to the taxing agency, was not objectionable as constituting an unlawful burden on the functions of the Federal Government.

3. The decision below is in conflict with the decision of this Court in *Graves et al. v. People of State of New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927.

The decision in the *Graves* case, in considering possible grounds for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency, held that the only possible basis for implying such an immunity would be that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions. (306 U. S. 466, 481, 59 S. Ct. 595, 598, 83 L. Ed. 927.) Recognizing that the economic burden of a state income tax on a federal employee is, of course, economically passed on to the employer, namely, the Federal Government, this Court nevertheless held that a non- discriminatory state tax is not vulnerable to objection on constitutional grounds.

It would seem, accordingly, that application of the California Sales and Use Tax Law to a trustee in bankruptcy

engaged in liquidating a bankrupt's estate is even less vulnerable to objection since the economic burden, if any (inasmuch as the statute provides for collection from the vendee under either the Sales or Use Tax provisions), would be passed on to the general creditors for whose benefit the trustee is acting and not to the Federal Government from which the trustee derives his official status.

4. The decision below is squarely in conflict with the decision of the Federal District Court for the Southern District of Illinois in the *In re Mid America Company* case, 31 Fed. Supp. 601, and the decision of the United States Court of Appeals for the Eighth Circuit in *State of Missouri v. Gleick*, 135 F. 2d 134. Both of the cited cases upheld the power of a state to impose unemployment compensation taxes upon a liquidating trustee in bankruptcy. The Court of Appeals for the Eighth Circuit, in its opinion at page 137, stated that it was influenced in reaching its decision by the opinion of this Court in the *Graves* case, *supra*, and stated:

> ". . . In the present case the tax, as an expense of administration of the bankrupt estate, is payable from the assets of that estate. By no stretch of the imagination may its collection be held to impose any burden whatsoever upon the United States or to limit or restrict the bankruptcy court as a department of the federal government or the trustee in bankruptcy, as an agent and officer of the court, in the discharge of the duties imposed by the Bankruptcy Act." (135 F. 2d 134, 137.)

5. Settlement of the questions presented is of importance in the administration of all state taxing statutes and the Federal Bankruptcy Act.

Subsequent to the decision of the District Judge in this matter (92 Fed. Supp. 639), the referees in bankruptcy in Southern California issued in excess of 100 orders, *ex parte*—solely upon petition of several trustees in bankruptcy, purporting to require state taxing agencies to file proofs of claim for tax liabilities arising in connection with the liquidating activities of trustees in bankruptcy and forever barring and restraining the taxing agencies from enforcing valid State taxing statutes against the trustees not only in their official capacities but in their individual capacities as well. Although petitioner was the first taxing agency of the State of California against whom injunctive relief was sought by trustees in bankruptcy in this jurisdiction, as set forth above, similar proceedings have since been initiated against the California Department of Employment (which administers and enforces the California Unemployment Insurance Act) and against local law enforcement officers, namely, the district attorney and city attorney of Los Angeles County, who, in appropriate instances, would be charged with prosecuting criminal violations under various taxing statutes.

Although petitioner applied to the Court of Appeals for the Ninth Circuit for a writ of prohibition directed to the District Court in Southern California to judicially establish the invalidity of the first group of the aforesaid 100 odd orders and to prevent the continued issuance of such orders, the petition for a writ of prohibition was denied without opinion.

The various taxing agencies of the State of California, including petitioner, accordingly find themselves in a very ambiguous position. On the one hand, the Controller of the State of California (who is also charged with administering some of the California taxing statutes) is, in

accord with the decision of this Court in the *Graves* case, *supra*, withholding under the Federal income tax provisions a substantial percentage of a very substantial State payroll and turning that percentage over to the Federal Government. On the other hand, other state agencies and officials are purportedly being enjoined by referees in bankruptcy from enforcing valid state taxing statutes against trustees in bankruptcy primarily upon the basis that the trustees in bankruptcy, although acting for general creditors, are instrumentalities of the Federal Government.

The Court of Appeals, in affirming the decision of the District Court, has to all effects and purposes ignored the decisions relied upon here and failed to indicate in any way whatsoever how the California taxing officials, including petitioner, can adopt a consistent approach to problems involving the application of Federal and State taxing statutes to Federal and State instrumentalities in the State of California.

It would further appear, if the decision below is permitted to stand and the wholesale purported enjoining of state and local officials from the performance of their statutory duties permitted to continue in California, that this vicious practice will necessarily spread to other states and give rise to endless and vexatious litigation and conflicts between the various states and the federal government which would be wholly unwarranted and uncalled for in light of the repeated expressions of opinion by this Court, in numerous cases which require no citation, that the fostering of conflicts between Federal and State governments should always be avoided.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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